Concerning the second issue, the Fifth Circuit's standing analysis rests upon a straightforward recognition that people can designate someone else to act for them, which is precisely what the 52 retirees did in signing consents for the Union to represent them in all matters arising under the CBA or the Plant Closure Agreement.[4]

Recognition of the Union's authority to act for the retirees with their express consent does not, as Goodrich contends, "improperly and cavalierly expand[ ] the jurisdiction of the federal courts beyond that adopted by Congress [in enacting LMRA § 301(b)]." (Pet. at 24.) Far from "re-writing" the statute, as Goodrich also charges, the Fifth Circuit has simply recognized a labor organization's standing to sue on behalf of retirees in the quite narrow circumstance of express, individual authorizations.

Because the Fifth Circuit's holding and reasoning are correct on both issues that Goodrich has brought forward, because no conflict with controlling or persuasive authority exists, and because in any event this case presents no question of sufficient importance to warrant this Court's attention and time, the petition should be denied.

Fifth Circuit's opinion below (Pet. at 11). The Union is not sure why Goodrich has tried to link *Circuit City* with this case; the argument section of the petition does not explain the putative connection. The closest Goodrich comes is in accusing the Fifth Circuit of implicitly using some sort of FAA finality analysis even though the court explicitly said that it was not.

[4] Too, the PCA itself, which was negotiated between Goodrich and the Union, addresses retiree medical benefits as well as containing the parties' broad agreement to arbitrate "any future disputes" arising under the PCA. Though the Fifth Circuit's opinion did not consider whether the PCA language itself constituted Goodrich's agreement to future Union representation of the retirees' interests, the Union advanced that argument below.

I. THE OPINION BELOW ON APPELLATE JURISDICTION IS CONSISTENT WITH THIS COURT'S PRECEDENT AND DOES NOT CREATE OR ADD TO A CIRCUIT SPLIT; AN ORDER COMPELLING § 301 ARBITRATION MUST BE "FINAL" IN THE ENTIRE CONTEXT OF THE PARTICULAR CASE IN ORDER TO BE APPEALABLE—AND THIS ONE WAS NOT.

The jurisdictional issue that the Fifth Circuit addressed can be summarized as whether this Court's precedent renders immediately appealable any order compelling § 301 arbitration even if (1) that order is not the "full relief" sought in a particular proceeding; (2) other claims were pleaded and effectively stayed pending arbitration; and (3) a district court expressly retains jurisdiction to take the case back up if necessary. Although Goodrich urges a bright-line test that would make such an order immediately appealable regardless of all other procedural and substantive circumstances, the case on which it relies does not quite say that.

In a short opinion written in a companion case to *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), this Court did hold that an order compelling arbitration under § 301 is final and hence appealable. *Goodall-Sanford, Inc. v. United Textile Workers*, 353 U.S. 550 (1957). The Court there viewed § 301 arbitration as "not merely a step in judicial enforcement of a claim nor auxiliary to a main proceeding, but the full relief sought." *Id.* at 551. Thus, wrote the Court, "[a] decree under § 301(a) ordering enforcement of an arbitration provision in a collective bargaining agreement is . . . a 'final decision' within the meaning of 28 U.S.C. § 1291." *Id.* at 551-52. The Court did not offer more of an explanation than that, nor did it discuss any situations in which that seemingly clear-cut rule might in fact not apply.

But as the Fifth Circuit noted, *Goodall-Sanford* "is procedurally distinguishable from the case at bar." (Pet. App. at 8.)

First, unlike the present case, the United Textile Workers sued only under § 301, seeking either an order to arbitrate or, in the alternative, damages. *Id.* (discussing lower court opinions in *Goodall-Sanford*). Here, in contrast, the Union pleaded an independent cause of action under the Declaratory Judgment Act, something the Fifth Circuit rightly considered a "critical distinction," because "the order compelling arbitration only granted the Union part of the relief it sought." (Pet. App. at 8-9.) The district court clearly retained jurisdiction to have the case reopened, presumably for any reason that might be available, "[i]f the claims in this suit are not resolved in arbitration . . . ." (Pet. App. at 35.)

Also distinguishing this case from *Goodall-Sanford* is the fact that the decree in the latter instance ended the litigation and left the district court with nothing to do but execute the judgment (Pet. App. at 9)—the classic formulation of a "final" order. The district court order in the present case could hardly be different, as the Fifth Circuit noted:

> Given that the district court rendered a final decision on the merits of the United Textile Workers' claims, it is unsurprising that the Supreme Court treated the lower court's decree as a final order under 28 U.S.C. § 1291. The district court in the instant case, however, did not render a "final and binding" judgment on the merits. Instead, the district court only ruled on the two Section 301 claims and declined to address the Declaratory Judgment Act claim. [Pet. App. at 9.]

Other factors that the Fifth Circuit found to have resulted in a non-final, unappealable order included the district court's administrative closure (the functional equivalent of a stay), as well as the district court's express "reservation of jurisdiction for the purpose of hearing substantive claims." (Pet. App. at 9-10.)

In short, *Goodall-Sanford* was based on the "unambiguous finality" of the lower court order, whereas the order at issue

here possesses "none of the salient indicia of finality." (Pet. App. at 10.) Under these contrasting situations, *Goodall-Sanford* does not control.

Unhappy with these clear differences and the resulting prospect of (bargained-for) arbitration, Goodrich insinuates that the Fifth Circuit has injected FAA finality principles into an otherwise settled area of labor law, accusing the court of being "entranced with a nitpicking approach to appellate jurisdiction in FAA cases." (Pet. at 13.) But that is something the Fifth Circuit took great pains to disavow:

> We find it unnecessary to revisit our dictum . . . that only Section 301, and not the FAA, applies to collective bargaining agreements because, regardless of which statute applies, our appellate jurisdiction depends in the first instance on whether the district court order was a "final order." . . . In light of our conclusion that the district court's order is not final under 28 U.S.C. § 1291 (and, as a result, appellate jurisdiction does not exist), there is no reason to reach the question of whether the FAA or traditional section 301 jurisprudence now controls controversies arising under a collective bargaining agreement. [Pet. App. at 6 n. 2.]

Contrary to Goodrich's accusations, the Fifth Circuit did nothing more than apply settled notions of finality under 28 U.S.C. §1291 to an order that fell far short of effectively ending the litigation, as an order compelling § 301 arbitration typically does. Beginning at page 7 of the petition, then, the bulk of Goodrich's next seven pages or so constitutes an irrelevant discussion of how FAA arbitration differs from labor arbitration; of why the two schemes should be kept separate; and of the difficulties that some courts have faced in deciding when an FAA arbitration order is final. These would be interesting issues in the appropriate case, perhaps, but have nothing to do with the Fifth Circuit's holding.

What the Fifth Circuit did was recognize that on these facts, and in the instant procedural posture, finality under 28 U.S.C. § 1291 is not rendered meaningless simply because a litigant seeks § 301 arbitration as *one* of its remedies. Neither *Goodall-Sanford* nor any other case has held otherwise. This is probably so because the finality of arbitration orders in pure § 301 cases is rarely in dispute at the circuit court level, most often because § 301 arbitration was the only relief sought in the district court, or because the district court expressly did not retain jurisdiction. Thus, the circuit cases alleged to conflict with the decision below do so merely superficially, if at all.[5]

Only a claim seeking to compel arbitration was at the heart of three of the five cases claimed to conflict with the Fifth Circuit's opinion here. *See Oil, Chem. & Atomic Workers v. Conoco, Inc.*, 241 F.3d 1299 (10th Cir. 2001) (union sued only to request specific performance of arbitration clauses); *International Union, UAW v. United Screw & Bolt Corp.*, 941 F.2d 466 (6th Cir. 1991) (union sued to enforce arbitration clause; district court granted summary judgment compelling arbitration); *United Steelworkers of America v. American Smelting & Refining Co.*, 648 F.2d 863 (3d Cir. 1981) (union had initially sued, successfully, to enforce arbitration clause, which court noted was final order based on *Goodall-Sanford*; appeal involved later filed suit—not a reopening of initial suit—to enforce arbitration award).

A fourth case, *Coca-Cola Bottling Co. v. Soft Drink & Brewery Workers Union Local 812*, 242 F.3d 52 (2d Cir. 2001), presented a different scenario in that the central appellate issue was whether the FAA applies to cases brought under § 301. The Second Circuit held that it does not, citing *Goodall-Sanford* only as an example of the "tension" between the FAA and *Lincoln Mills* that "has been evident from the

---

[5] Goodrich's discussion of an alleged conflict with other circuits appears at pages 16-17 of its petition.

beginning." *Id.* at 55. In the end, the Second Circuit found appellate jurisdiction not because of *Goodall-Sanford*, but because in entering an order plainly designated as "final," the district court "clearly stated that no further proceedings will be conducted in this matter, and the judgment [ordering arbitration] is therefore final and appealable under 28 U.S.C. § 1291." *Id.* at 56. (The district court order stated that "necessary proceedings, if any, to enforce or vacate any future decisions of the arbitrator may be brought in a new action." *Id.* at 54 (citing unpublished memorandum and order).)

The instant case thus does not conflict with *Coca-Cola Bottling* because (1) the Fifth Circuit's decision did not involve the FAA/section 301 interplay, and (2) the district court order at issue here is precisely opposite in nature from the explicitly final one that the Second Circuit faced.

The present case *might* theoretically conflict with the only other case Goodrich advances for that proposition, *United Steelworkers of America v. Black, Sivalls & Bryson, Inc.*, 608 F.2d 303 (8th Cir. 1979), except that the Eighth Circuit's one-page opinion reveals too little to allow a persuasive claim of conflict. All that can be gleaned from *Black, Sivalls* is that the union and a number of retired steelworkers filed a class action concerning certain benefits, and that the plaintiffs "asked the court to declare the rights of the retired employees and to award them damages and other equitable relief." *Id.* at 304. In the alternative, the plaintiffs requested arbitration. Six years into what had apparently become a procedurally complex case, the district court ordered the parties to arbitrate, and the company appealed.

Without citing *Goodall-Sanford*—or even § 301—the entirety of the Eighth Circuit's reasoning and holding is contained in one paragraph:

> Two questions are now before us: (1) whether the District Court's order compelling arbitration is appealable under 28 U.S.C. § 1291; and (2) if so, whether the

> union waived its right to arbitration. After a careful review of the briefs and oral argument, we hold that the order referring the matter to arbitration is appealable and that the District Court's holding that the union had not waived its right to compel arbitration is not clearly erroneous. [*Id.*]

Due to the paucity of information contained in the *Black, Sivalls* opinion, it is a stretch to maintain, as Goodrich does, that a conflict exists.

One final note: Goodrich argues that the Union's claim for declaratory relief was superfluous and basically a sham—but it never sought to move for dismissal or for summary judgment on that count. What is more, Goodrich's letter brief to the Fifth Circuit on appellate jurisdiction nowhere argued that the presence of the Union's declaratory judgment count should be completely ignored for purposes of analyzing finality, which seems now to be its position.

And, just as important, declaratory judgment concerning the parties' rights and duties under the PCA here was in fact a legitimate and eminently reasonable avenue for relief inasmuch as Goodrich typically revisits its health benefits yearly. That is, by seeking a broad judicial declaration of what Goodrich had and had not bound itself to under the PCA, the Union sought to avoid the prospect of constant arbitration over every future proposed change in retiree medical benefits.

Perhaps most puzzling is Goodrich's concluding point on this issue (made basically as a throwaway argument but needing a brief rebuttal nonetheless). According to Goodrich, unions will start including "sham requests for declaratory relief" in any § 301 action involving an arbitration request in order to "avoid timely, meaningful appellate review of an order compelling arbitration in a § 301 case." (Pet. at 18.) Why unions would not have the same interest as employers in having finality in arbitration orders is something Goodrich does not explain. No explanation is possible, really, because

Goodrich's point proceeds from the false premise that unions' and employers' interests in finality diverge. They do not, nor is there any logical reason why they would.

This case was narrowly decided based on a set of facts not particularly likely to recur. More to the point, in light of significant procedural differences between this case and those cited by Goodrich, the Fifth Circuit correctly held that the district court's order was not final. Granting certiorari on this point would not lead to the settling of any unsettled law, nor is the issue important enough to warrant review.

II. THE FIFTH CIRCUIT'S HOLDING ON THE UNION'S STANDING TO REPRESENT CONSENTING RETIREES DOES NOT CONFLICT WITH PRECEDENT FROM EITHER THIS COURT OR THE SEVENTH CIRCUIT, AS CLAIMED; NOR WILL IT HAVE A SIGNIFICANT IMPACT ON FEDERAL JURISPRUDENCE.

In keeping with unambiguous statutory definitions, the Fifth Circuit acknowledged that if the Union could not compel Goodrich to bargain over retiree benefits, which it cannot,

> it must also be true that the Union cannot hail Goodrich into court on the strength of its claim that the term "employees" in Section 301(b), which is also defined at 29 U.S.C. § 152(3), can be broadly read to include retirees.

Pet. App. at 15 (citing *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass*, 404 U.S. 157, 172 (1971)). As a result, without more the Union could not act on the retirees' behalf, as it would lack standing. But there was more, as the Fifth Circuit found determinative: fifty-two signed consents that authorized the Union to represent those retirees

in pursuing any claims under the PCA or CBA.[6] The effect of those consents in creating standing was supported, correctly, by three rationales.

First, because with *Pittsburgh Plate Glass* this Court carved out an exception recognizing that retirees have federal remedies under § 301 even though that statute "only creates a right of action for unions against employers and union members against their unions," the Fifth Circuit concluded that § 301's plain language could not logically be an "impediment" to the Union's suit in these circumstances. (Pet. App. at 16-17.) Second, case law restricting the scope of a union's authority to act for retirees is meant to keep unions from overreaching and acting against the retirees' wishes, a concern "not implicated" by recognizing standing on behalf of retirees who *want* the union to represent them. (Pet. App. at 17.) Finally, giving the Union standing to represent these consenting retirees would be consistent with federal labor policy by providing a "convenient vehicle" for the collective claims to be litigated, and would honor the retirees' explicit request for Union representation. (Pet. App. at 18-19.)

Goodrich has offered no discernible reason to show why the Fifth Circuit was wrong or, just as important, to demonstrate that this unusual situation is likely to recur in such a way that some grave legal error will be continued and com-

---

[6] Goodrich's second Question Presented is framed more broadly than the petition's substantive discussion would indicate, and on its face goes beyond what the Fifth Circuit held. That is, although Goodrich's argument deals only with whether a union has standing to represent retirees—and the opinion below limits it even further, to only *consenting* retirees—the Question Presented could conceivably be read to claim that a union can never enforce an arbitration clause in a plant-closure situation because, after closure, there are no "employees" on whose behalf the union could arbitrate anything. To the extent Goodrich's petition presents that broader issue, however, it does so in a vacuum, because the Fifth Circuit declines to rule on anything beyond the Union's standing to represent consenting retirees. (Pet. App. at 15-16).

pounded. Moreover, neither the Fifth Circuit's holding nor its rationales conflict in any way with *Pittsburgh Plate Glass*.[7]

Even less of a conflict is presented by the Seventh Circuit's opinion in *Rosetto v. Pabst Brewing Co.*, 128 F.3d 538 (7th Cir. 1997), despite Goodrich's unequivocal but incorrect assertion of such a conflict, and its further statement that the Fifth Circuit "acknowledged" it. (Pet. at 23; Pet. App. at 18 n. 6.) In fact, just as here, *Rosetto* held that a union could indeed represent retirees, but only if "each of the retirees assents to its representation." 128 F.3d at 541.[8]

In this much—the very point on which Goodrich has staked its second issue—the Fifth and Seventh Circuits agree wholeheartedly. The difference comes in the Fifth Circuit's disavowal of the Seventh Circuit's further requirement that the *company* must consent to union representation of retirees:

> The *Rosetto* court cites no authority for the proposition that a plaintiff's Article III standing depends on consent of the defendant, and we decline to follow that aspect of the opinion's holding. [Pet. App. at 18 n. 6.]

This difference would be a true conflict only if Goodrich seeks review to establish that its own consent, in addition to that of the 52 retirees, was a prerequisite to the Union's standing—but since it argues that *no* consent, from whatever quarter, can yield standing, this distinguishing aspect of *Rosetto* is beside the point.

In short, there is no conflict with authoritative or persuasive authority; the Fifth Circuit's analysis was correct; and, in any event, this issue is not so significant as to deserve this Court's attention.

---

[7] To be fair, Goodrich does not exactly argue a clear conflict with *Pittsburgh Plate Glass*; the closest it comes is in stating that the district court "failed to appreciate the significance" of that case. (Pet. at 21.)

[8] The case was dismissed for lack of jurisdiction because the retirees had not consented to the union's representation.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

ELIZABETH STURDIVANT KERR
2035 Marigold Avenue
Fort Worth, Texas 76111
(817) 831-2050

JAMES RODDY TANNER
Counsel of Record
TANNER AND TROUTT, P.C.
6000 Western Place, Suite 100
Fort Worth, Texas 76107
(817) 377-8833

Attorneys for Respondent

No. 05-323

In The
Supreme Court of the United States

GOODRICH CORPORATION,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL LODGE 2121 AFL-CIO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Of Counsel
LAWRENCE J. MCNAMARA
LOCKE LIDDELL & SAPP LLP
2200 Ross Avenue,
Suite 2200
Dallas, Texas 75201
(214) 740-8000

DAVID E. NAGLE
Counsel of Record
LECLAIR RYAN
Riverfront Plaza,
East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 343-4077
Counsel for Petitioner

October 2005

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

In its facile efforts to suggest that review by this Court is unnecessary, the Union has taken positions inconsistent with those advanced by the Union in the courts below. Should the petition be granted, the presence of the record will force the Union to abandon some of the mischaracterizations upon which it relies in its effort to avoid review.

The ruling below is significant, wrong, and unprecedented, and failure to overturn it swiftly will have momentous consequences. With respect to the question presented regarding appellate jurisdiction, the ruling below forsakes the long-standing criteria for appellate review of Section 301 orders compelling arbitration, in favor of the circumscribed review available when arbitration has been compelled pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("the FAA"). In support of that holding, the Union now eschews its record position and contends that its request for a declaratory judgment is an unresolved, independent cause of action, thwarting appellate review of the § 301 order compelling arbitration.

With respect to the issue of standing, the ruling below repudiates the clear language of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("§ 301") which both establishes and limits the right of a union to sue on behalf of employees whom it represents, declaring expansively that a union may bring suit on behalf of non-employees "who have authorized the union to do so." To bolster that finding in support of its desired result, the Union now abandons its record position that it has standing of its own and adopts the Fifth Circuit's view that

standing is freely assignable and conferred by authorization of the third parties who themselves suffered an injury in fact. Unfettered by considerations of consistency, the Union contends that the ruling below is correct, "unremarkable," and "undeserving of the Court's attention."

The Union cannot avoid review by abandoning its position below that an order compelling arbitration effectively would dispose of the entire action, in order to embrace the Fifth Circuit's holding that the declaratory judgment sought is an independent cause of action remaining to be decided and preventing review of the § 301 arbitration order.

In opposing the petition for a writ of certiorari, the Union now declares that Count III of the complaint, purportedly seeking a declaration of the parties' rights, was "something the Fifth Circuit rightly considered a 'critical distinction' because 'the order compelling arbitration only granted the Union part of the relief it sought.'" (Brief in Opposition, hereinafter "Br. Opp.," at 9). The Union now claims that the district court's order "fell far short of effectively ending the litigation." (Br. Opp. at 10). However, the Union's position below actually supports petitioner's contention, as explained in the Petition for a Writ of Certiorari ("Pet."), that Count III was without effect, and the order compelling arbitration was, in fact, the full relief sought. Indeed, on July 2, 2003, *the Union* filed a pleading in the district court admitting, *"An order granting [the Union's] pending motion for partial summary judgment would effectively dispose of the entire action, since the parties would then present the underlying dispute on the merits to [the] Arbitrator."* (emphasis added).

The Union now claims to be bewildered by Goodrich's reference to *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), and "some sort of FAA finality analysis." (Br. Opp. at 7, n. 3). However, the Union (which never had questioned the existence of appellate jurisdiction during briefing or oral argument before the court of appeals), in response to the Fifth Circuit's raising the issue *sua sponte*, submitted a supplemental letter brief declaring that *Circuit City* and *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) had "cast *Goodall-Sanford* into some doubt," and urging that, even if the court of appeals were to conclude that the FAA were inapplicable, the FAA finality analysis in *Green Tree* be relied upon as guidance. Perhaps more bewildering is the Union's contention that the Fifth Circuit's decision did not depart from precedent, nor create a circuit split, despite the Union's inability to identify a *single* other case in the nearly five decades since *Goodall-Sanford* where appellate jurisdiction to review an order compelling arbitration in a § 301 action was found to be lacking.

In *Goodall-Sanford, Inc. v. United Textile Workers*, 353 U.S. 550 (1957), this Court recognized that in a § 301 action, an order compelling arbitration *is* granting the relief sought, and thus is appealable. The rule established by *Goodall-Sanford* is clear, reasonable, and controlling. This case presents the question of the continued vitality of *Goodall-Sanford*, and the applicability of FAA standards of finality in § 301 actions. The lower courts are in complete disarray over the seemingly simple issue of the appropriate administrative disposition when a order compelling arbitration, in reliance upon the FAA, is granted, but the muddled state of affairs in FAA cases need not migrate to Section 301 actions merely because a

court of appeals falls into the trap of merging the distinct bodies of law. If the ruling of the court of appeals is allowed to stand, advocates for unions quickly will recognize that the swift appellate review of orders compelling arbitration in § 301 actions can be avoided by the simple contrivance of including a vacuous Declaratory Judgment Act count.

The Union's newly espoused view that standing is freely assignable and that its standing here arises solely from the consent of some retirees goes far beyond the Fifth Circuit's ruling and ignores well-established standing principles.

The court of appeals rejected the clear language of § 301 and declared that retirees could give the Union standing even if Congress had not. The Union, remarkably, claims that there is no conflict with authoritative or persuasive authority, that the Fifth Circuit's analysis was correct, and that the issue presented is not significant. Again, the Union is wrong and is taking a position inconsistent with its own conduct and contentions in the courts below.

On the same day that the Union filed its Complaint in this action, the Union submitted "a list of all persons and organizations which are interested in the outcome of this case" pursuant to a local rule of court. The Union's complete list included: the IAM international union, two IAM local unions, Goodrich Corporation, and counsel of record for the Union. No one else. No retirees were mentioned, individually or collectively. In its effort to discourage review of the Fifth Circuit's order, the Union not only abandons the position that the Union has taken throughout these proceedings but expresses even a far more

expansive view of standing than that espoused by the court of appeals.

First, as even a cursory review of the record will make clear, the Union's position from the outset has been that *the Union* had standing to bring this action in its own name and on its own behalf. In the Union's motion for partial summary (that led to the order compelling arbitration), the Union repeatedly asserted that the Union has standing to enforce all terms of a collective bargaining agreement, and *the Union declared that "the union has standing to prosecute this action . . . whether or not [the affected retirees] have expressly authorized such representation."* (emphasis added).

At no time prior to its Brief in Opposition has the Union taken the position that its standing is on behalf of retirees, and dependent upon "the quite narrow circumstances of express, individual authorizations." (Br. Opp. at 7). Not content merely to change its view, the Union now goes far beyond the position taken by the court of appeals, declaring that "the Fifth Circuit's standing analysis rests upon a straightforward recognition that people can designate someone else to act for them, which is precisely what the 52 retirees did in signing consents for the Union to represent them in all matters arising under the [collective bargaining agreement]." (Br. Opp. at 7).

This assertion is a remarkable misstatement of the law. Standing is not acquired merely because one who has standing designates another to act for him. "The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without

exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). "It is axiomatic that a litigant must first clearly demonstrate that he has suffered an injury in fact in order to assert Article III standing to sue. . . . It is the burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he has been injured." *Wyoming v. Oklahoma*, 502 U.S. 437, 465 (1992). "The Article III judicial power exists only to redress or otherwise protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered some threatened or actual injury. . . . [T]his court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Selden*, 422 U.S. 490, 499 (1975). Neither the court of appeals, nor the Union, offered any explanation of the nature of the Union's standing here.

The concerns are not purely academic, for as it has been recognized, "Litigants who have no personal right at stake may have very different interests from the individuals whose rights they are raising. Moreover, absent a personal right, a litigant has no cause of action (or defense) and thus no right to relief." *Kowalski v. Tesmer*, 543 U.S. 125, 125 S. Ct. 564, 571 (2004) (Thomas, J., concurring).

The decision of the court of appeals here has the potential to create enormous mischief, for it suggests that standing is a flexible concept, and that it is freely assignable (even where the assignment is contrary to an express statutory limitation), without any evaluation of the propriety of such an assignment. Although the Union declares that the Fifth

Circuit's ruling is not in conflict with authoritative or persuasive authority, and is not so significant as to warrant this Court's attention, it has already drawn the attention of at least Circuit Judge Richard Posner, who cited it as an illustration of cases suggesting that "the rule of standing could be bent." *See Depuy, Inc. v. Zimmer Holdings, Inc.*, 384 F.Supp.2d 1237, 2005 U.S. Dist. LEXIS 20827 at *7-8 (N.D. Ill. 2005) (Posner, Circuit Judge, sitting by designation).

The court of appeals erred in finding that the Union had standing to represent the retirees affected by the proposed change in benefits, by virtue of authorizations executed by some, but not all affected retirees, months after the action was initiated. The Union no longer maintains the view of standing which it espoused before the district court and the court of appeals, but instead has adopted and expanded upon the court of appeals' casual regard for well-established standing principles.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel
LAWRENCE J. MCNAMARA
LOCKE LIDDELL & SAPP LLP
2200 Ross Avenue,
Suite 2200
Dallas, Texas 75201
(214) 740-8000

DAVID E. NAGLE
Counsel of Record
LECLAIR RYAN
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 343-4077
Counsel for Petitioner